86 1813

No.

Supreme Court, U.S.
FILED
MAY 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

V.L. COOPER, ET AL., PETITIONERS

v.

FRANK K. KOTARSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

MICHAEL K. KELLOGG
Assistant To The Solicitor General

BARBARA L. HERWIG
RICHARD A. OLDERMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a probationary employee, for whom the Civil Service Reform Act of 1978 provides limited remedies for adverse personnel actions, including referral to the Special Counsel for investigation of allegedly "prohibited personnel practices" (5 U.S.C. 1206(a)(1)), but excluding a general right of review by the Merit Systems Protection Board or any court, may bring a *Bivens* action against his superiors seeking money damages for alleged constitutional violations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	10
Conclusion	16
Appendix A	1a
Appendix B	23a
Appendix C	30a
Appendix D	31a
Appendix E	32a

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 7, 8, 9, 10, 11, 12, 13, 14, 15

Braun v. *United States*, 707 F.2d 922 (6th Cir.), cert. denied, 464 U.S. 991 (1983). 14

Broadway v. *Block*, 694 F.2d 979 (5th Cir. 1982) 14

Bush v. *Lucas*, 462 U.S. 367 (1983) 7, 8, 9, 11, 12, 13, 14, 15

Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) 5

Cazalas v. *Dep't of Justice*, 569 F. Supp. 213 (E.D. La. 1983), aff'd, 731 F.2d 870 (5th Cir. 1984), cert. denied, 469 U.S. 1207 (1985) 14

Cutts v. *Fowler*, 672 F.2d 138 (D.C. Cir. 1982) 5

Egger v. *Phillips*, 710 F.2d 292 (7th Cir.), cert. denied, 464 U.S. 918 (1983) 14

Francisco v. *Schmidt*, 575 F. Supp. 1200 (E.D. Wis. 1983) 14

Freedman v. *Turnage*, 646 F. Supp. 1460 (W.D. N.Y. 1986) 14

Gleason v. *Malcom*, 718 F.2d 1044 (11th Cir. 1983) 14

Harding v. *USPS*, 618 F. Supp. 1330 (S.D. W.Va. 1985) . 14

Harris v. *Moyer*, 620 F. Supp. 1262 (N.D. Ill. 1985) 14

Hubbard v. *EPA*, No. 85-5145 (D.C. Cir. Dec. 5, 1986) .. 14, 15

Cases—Continued: Page

Lovshin v. *Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), cert. denied, No. 85-882 (Apr. 7, 1986) 3
McIntosh v. *Weinberger*, 810 F.2d 1411 (8th Cir. 1987) .. 14
Palermo v. *Rorex*, 806 F.2d 1266 (5th Cir. 1987) 13
Pinar v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) 13
Spagnola v. *Mathis*, No. 84-5530 (D.C. Cir. Dec. 5, 1986) 14, 15
United States v. *Fausto*, cert. granted, No. 86-595 (Jan. 12, 1987) 15
Wells v. *FAA*, 755 F.2d 804 (11th Cir. 1985) 13

Constitution, statutes and regulations:

U.S. Const.:
Amend. I 11, 14, 15
Amend. V 6
Amend. IX 6
Age Discrimination in Employment Act of 1967, § 15(c) 29 U.S.C. 633a(c) 5
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:
§ 717, 42 U.S.C. 2000e-16 ..... 6, 7
§ 717(c), 42 U.S.C. 2000e-16(c) 5
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 2
5 U.S.C. 1204 4
5 U.S.C. 1206 4
5 U.S.C. 1206(a)(1) 13
5 U.S.C. 1206(c)(1)(A) 4
5 U.S.C. 1206(c)(1)(B) 4
5 U.S.C. 1206(g) 4
5 U.S.C. 1207(b) 4
5 U.S.C. 2103(a) 10
5 U.S.C. 2108(3) 2
5 U.S.C. 2302 ..... 4, 32a
5 U.S.C. 2302(b)(9)(A) 13
5 U.S.C. (& Supp. II) 3301 10
5 U.S.C. (& Supp. II) 3302(1) 10
5 U.S.C. 3321 3
5 U.S.C. 4301 *et seq.* (ch. 43) 2, 3, 4
5 U.S.C. 4303 ..... 3, 34a

Constitution, statutes and regulations—Continued: Page

5 U.S.C. 4303(b)(1) 2
5 U.S.C. 4303(e) 2, 10
5 U.S.C. 4303(f) 3
5 U.S.C. 7501(1) *et seq.* (ch. 75) 2, 3, 4
5 U.S.C. 7501 ..... 3, 36a
5 U.S.C. 7503 ..... 3, 11, 36a
5 U.S.C. 7511(a)(1) 3, 10, 37a
5 U.S.C. 7513(a) 2, 39a
5 U.S.C. 7513(b) 3, 39a
5 U.S.C. 7513(d) 3, 39a
5 U.S.C. 7702 5
5 U.S.C. 7703(b)(1) 3
5 U.S.C. 7703(b)(2) 5
Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. 216(b) 5
Rehabilitation Act of 1973, 29 U.S.C. 791 5
28 U.S.C. 1631 9
Exec. Order No. 10,577, 3 C.F.R. 218 (1954-1958 Comp.) 10
5 C.F.R.:
Pt. 213:
Section 213.101(a) 10
Section 213.3102(a) 10
Section 213.3102(d) 10
Section 213.3301 10
Pt. 315:
Section 315.804 3
Section 315.805 4
Section 315.806(b) 4
Section 315.907(c) 4
Section 315.908 4
Pt. 1250:
Section 1250.3(b) 4

Miscellaneous:

S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 11, 13

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

V.L. COOPER, ET AL., PETITIONERS

v.

FRANK K. KOTARSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General—on behalf of V.L. Cooper and A.E. Navarro, civilian employees of the Naval Air Rework Facility (NARF), W.J. Tinston, Executive Officer of NARF, and J.H. Kirkpatrick, Commanding Officer of NARF—petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-22a) is reported at 799 F.2d 1342. The opinion and order of the district court (App., *infra,* 23a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 30a) was entered on September 16, 1986. A petition for rehearing and a suggestion for rehearing *en banc* were denied on January 13, 1987 (App., *infra,* 31a). On April 6, 1987, Justice O'Connor extended the time for filing a petition

for a writ of certiorari to and including May 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth at App., *infra*, 32a-40a.

STATEMENT

1. In the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, Congress comprehensively revised and restated the statutory provisions, codified in various chapters of Title 5, United States Code, governing the personnel procedures of federal agencies and the rights of agency employees. In particular, Chapter 43, 5 U.S.C. 4301 *et seq.*, requires agencies to evaluate employees' performance in light of the "critical elements" of their jobs; it authorizes removal or reduction in grade on account of unacceptable performance and sets forth the rights of employees who are removed or reduced in grade for this reason.[1] Chapter 75, 5 U.S.C. 7501 *et seq.*, governs adverse personnel actions (including removals, suspensions, and reductions in grade or pay) other than removals or reductions in grade under Chapter 43.[2] It

---

[1] Chapter 43 provides rights to notice, representation by an attorney, "a reasonable time to answer orally and in writing," and a written decision meeting certain standards. See 5 U.S.C 4303(b)(1). It also provides that "any employee who is a preference eligible [*i.e.*, a veteran (see 5 U.S.C. 2108(3))] or is in the competitive service" may appeal a removal or reduction in grade under Chapter 43 to the Merit Systems Protection Board. 5 U.S.C. 4303(e).

[2] Chapter 75 thus differs from Chapter 43 in that all adverse actions under Chapter 43 relate to inadequate job performance as measured by ratings of performance on the critical elements of employees' jobs, whereas actions taken under Chapter 75 may relate to inadequate job performance or be based on other sorts of inadequacies, including

authorizes these adverse actions "for such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)), and also sets forth the procedural rights of affected employees.[3]

Both Chapters 43 and 75 provide most employees with a right to review of most adverse personnel actions by the Merit Systems Protection Board (MSPB), and for subsequent review of the MSPB's decision in the Federal Circuit. 5 U.S.C. 7703(b)(1). However, probationary employees are explicity excluded from these procedural protections.[4] Indeed, it is a fundamental element of the federal competitive service that initial appointments and promotions to supervisory or management positions may be made on a trial basis and only become final upon completion of a probationary period. 5 U.S.C. 3321.

It does not follow, however, that probationary employees are without any protections under the CSRA. While excluded from the provisions of Chapters 43 and 75, probationary employees who are either terminated from an initial appointment or demoted from a supervisory or management position are entitled to written notice in advance of the adverse action. 5 C.F.R. 315.804;

---

misconduct. See *Lovshin* v. *Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), cert. denied, No. 85-882 (Apr. 7, 1986).

[3] Chapter 75 is similar to Chapter 43 in providing rights to notice, representation by counsel, a reasonable time to answer, and a written decision. 5 U.S.C. 7503, 7513(b). It also provides that "an employee against whom an action [more serious than a 14 day suspension] is taken * * * is entitled to appeal to the Merit Systems Protection Board." 5 U.S.C. 7513(d); see also 5 U.S.C. 7503.

[4] Section 4303(f) explicitly excepts from the procedural protections of Section 4303 individuals promoted to supervisor or manager on a probationary basis, or serving a probationary period under an initial appointment.

Chapter 75 explicitly excludes probationary employees from the definition of "employee" to whom its provisions apply. 5 U.S.C. 7511(a)(1); see 5 U.S.C. 7501.

5 C.F.R. 315.907(c).[5] If the adverse action is allegedly based "on partisan political affiliation or marital status," probationary employees then have a right of appeal to the MSPB, and consequent judicial review (5 C.F.R. 315.908; 5 C.F.R. 315.806(b)).

Probationary employees also have an additional remedy, which they share with all other federal employees. The CSRA created an Office of Special Counsel (5 U.S.C. 1204) to investigate "prohibited personnel practices" (5 U.S.C. 2302), which are broadly defined to include actions improperly motivated on grounds of discrimination, retaliation, nepotism, "whistleblower" conduct, and a wide range of other inappropriate considerations. 5 U.S.C. 2302; 5 C.F.R. 1250.3(b). The Special Counsel is authorized to investigate charges brought by probationary employees, 5 U.S.C. 1206, and if he finds reasonable grounds to believe that a prohibited personnel practice has occurred, may recommend corrective action to the agency. If the agency fails to implement the recommended corrective action, the Special Counsel may initiate a proceeding before the Board to compel such action. 5 U.S.C. 1206(c)(1)(A) and (B).[6] Judicial review of actions taken, or not taken, by the Special Counsel is "limited, at most, to ensuring compliance with the statutory requirement that the OSC perform an adequate inquiry." *Cutts* v. *Fowler*,

---

[5] If the termination of a probationary employee from an initial appointment is based on conditions arising before the commencement of service, procedures similar to those in Chapters 43 and 75, including MSPB appeal and judicial review, are provided. 5 C.F.R. 315.805.

[6] The Special Counsel also has the authority to initiate disciplinary proceedings before the Board against a manager guilty of a prohibited personnel practice. 5 U.S.C. 1206(g). The Board may discipline the manager by ordering "removal, reduction in grade, or debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000." 5 U.S.C. 1207(b).

692 F.2d 138, 140 (D.C. Cir. 1982). See also *Carducci* v. *Regan,* 714 F.2d 171, 175 (D.C. Cir. 1983).[7]

2. On January 25, 1981, respondent Frank K. Kotarski, a civilian employee of the Naval Air Rework Facility in San Diego, California, was promoted on a probationary basis from a GM-12 Engineer to a GM-13 Supervisory Industrial Engineer. On December 18, 1981, within the one-year probationary period, respondent was notified that because of his unsatisfactory performance he would not be retained in the supervisory position. Respondent received a complete explanation in writing of the reasons he was not being retained as a supervisor, which included a failure to guide and direct subordinates, delay in completing work assignments, and an inability to perform duties without close supervision. On January 24, 1982, respondent was returned to his former position.

Respondent attempted to obtain review of this decision by the MSPB. He asserted in a letter to the Board that his demotion was "malicious in nature and motivated by my marital status, living arrangements and other factors unrelated to my performance on the job" (C.A. App. Exh. 7-C). Respondent also wrote to the Office of the Special Counsel, alleging that "the adverse personnel action taken against me was motivated in whole or in part by my living arrangement with [co-worker] Ms. Janice Elaine Magana. I allege that the relationship of a single man and woman

---

[7] There is a separate provision for judicial review of allegations of discrimination. 5 U.S.C. 7703(b)(2) provides that cases involving allegations of discrimination brought by federal employees are to be filed as provided in Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), Section 15(c) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(c), and Section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), as applicable. 5 U.S.C. 7702 makes careful provision for all such claims, as well as for cases arising under the Rehabilitation Act of 1973, 29 U.S.C. 791, within the scheme of review by the MSPB. Probationary employees are entitled to bring discrimination charges under these statutes.

living together is incompatible with managements [*sic*] position in this area." C.A. App. Exh. 7-D.

The MSPB found no jurisdiction to review respondent's complaint. The Office of the Special Counsel, however, conducted an investigation, "interviewing several witnesses, reviewing files and gathering documentary evidence," and subsequently informed respondent that the investigation had failed to yield evidence to support his allegations. "The evidence was insufficient to establish that those matters [alleged] were significant factors in your demotion. We found stronger evidence that you were demoted based on management's perceptions that your performance as a supervisor was deficient" (C.A. App. Exh. 8-B).

3. Following denial of his claims by the Special Counsel, respondent filed the present lawsuit, alleging that respondent's supervisors, V.L. Cooper and A.E. Navarro, and his commanding officers at the Navy Rework Facility, W.J. Tinston and J.H. Kirkpatrick, had violated his First, Fifth and Ninth Amendment rights by demoting him to the GM-12 position.[8] Respondent's complaint alleged that his demotion was due to his "private relationship with his girlfriend," a relationship which, respondent asserted, his supervisors viewed as "morally wrong." He also alleged that his failure to be promoted was punishment for speaking out and challenging certain policies of his supervisors, particularly in retaliation for his actions in support of an EEO complaint brought by his girlfriend (see note 8,

---

[8] Respondent also filed a second lawsuit, making essentially the same factual allegations and asserting a violation of Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. Respondent swore, in an affidavit filed with the court in this second suit, that "my involvement in the EEO complaint of Janice E. Magna was the primary reason for my demotion from a GA-13 branch head to a GM-12 Industrial Engineering position." C.A. App. Exh. 7-B. This lawsuit is presently pending in federal district court.

supra). Damages in the amount of $500,000 were sought from the defendants sued in their individual capacities, under the authority of *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). The lawsuit also sought reinstatement, back pay, and a judgment that respondent's demotion had been arbitrary and capricious under the APA and had violated his right to due process by taking property (*i.e.*, an expectation that his probationary position would turn into a permanent one) without providing due process of law.

The district court granted the government's motion to dismiss. The court held that since plaintiff alleged that his demotion was in retaliation for his support of a fellow worker's EEO complaint, the sole remedy available to him was his action under 42 U.S.C. 2000e-16. The court also held that, even if respondent's lawsuit could be brought, a *Bivens* remedy was unavailable under this Court's decision in *Bush* v. *Lucas,* 462 U.S. 367 (1983). "In *Bush,* the Court indicated that where a federal personnel decision is at issue, the presence of the comprehensive civil service scheme precludes the grant of *Bivens* relief" (App., *infra,* 27a). The court rejected respondent's argument that *Bush* was distinguishable because the plaintiff in *Bush* had a full panoply of procedural rights which are not available to probationary employees. Noting that respondent had received all the review provided by Congress for probationary employees, the court declined to override Congress's "reasoned choice that personnel decisions as to probationary employees should be governed by fewer impediments to managerial discretion." App., *infra,* 28a.

4. A divided panel of the court of appeals reversed. It held, first, that Title VII is not an exclusive remedy for the wrongs alleged in respondent's *Bivens* complaint. It also stated that respondent's pursuit of a Title VII action could not prevent him from bringing a *Bivens* suit "based on alleged constitutional infractions having nothing to do with Title VII." App., *infra,* 5a.

The court of appeals further held that *Bush* v. *Lucas* does not prevent a *Bivens* action by respondent against his supervisors and commanding officers. In the majority's view, *Bush*, "cannot be read apart from its pervasive emphasis on the remedies provided by Congress for the complaining employee in that case * * *." App., *infra*, 9a. While admitting that "[t]his ruling presents a much closer question than the Title VII issue" (App., *infra*, 6a), the court of appeals determined that the remedies available to the respondent as a probationary employee were not "meaningful" within the meaning of *Bush* (App., *infra*, 11a). The court acknowledged that respondent's charges had been investigated by the MSPB's Special Counsel and found wanting. But because investigation by the Special counsel is not "part of a system of enforceable relief for constitutional violations" (*ibid.*), the court refused to credit this procedure as protecting a probationary employee's rights. "Unlike the complainant in *Bush*, the probationary employee has no enforceable right, and no judicial review, even if he or she demonstrates a constitutional violation" (*ibid.*).

The court of appeals conceded that "management must retain great flexibility in determining that a probationary employee ought not to be granted permanent status" (App., *infra*, 8a), and that it may be "anomolous to give probationary employees a greater protection of their constitutional rights, by way of a *Bivens* action, than is available to fully tenured employees, who are confined to their civil service remedies" (App., *infra*, 13a). Also, the court noted decisions of other courts that were in direct conflict with its own view (App., *infra*, 7a). It nonetheless reasoned that Congress "could not have intended such an untoward result" as to "deprive probationary employees of all meaningful protection for their constitutional rights" (App., *infra*, 13a), and therefore ruled that respondent

could maintain a *Bivens* action for money damages against his supervisors and commanding officers.[9]

Judge Hall, in dissent, argued that the majority had ignored the holding of this Court in *Bush* v. *Lucas*, which stressed the comprehensiveness of the remedies provided by Congress for federal employees and did not invite courts to second-guess the adequacy of those remedies. Judge Hall noted that Congress had made a deliberate decision to limit the remedies of probationary employees, but had not left them without any protection. "Congress has determined that review by the Special Counsel and in certain cases by the Board sufficiently deters constitutionally impermissible personnel decisions while maintaining morale and efficiency." App., *infra*, 21a. Thus, "Kotarski cannot claim that 'it is damages or nothing.' *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)" (*ibid.*). Judge Hall concluded (*ibid.*):

> Congress has enacted a scheme carefully tailored to balance the many competing concerns implicated in regulating federal employment * * * In crafting the system, Congress has decided that different levels of protection are required for rights of differing magnitude * * * *Bush* has stated that Congress is in the better position to decide whether a damage remedy is appropriate.

On January 13, 1987, the panel voted unanimously to deny rehearing, and no judge of the Court voted in favor of rehearing *en banc*.

---

[9] The panel also (a) found that review of respondent's demotion was not available under the APA; (b) remanded to the district court the questions of official immunity and whether there had been a due process violation; and (c) ruled that the district court had no jurisdiction over respondent's claim to reinstatement and back pay, which exceeded $10,000. The panel left to the discretion of the lower court whether to transfer that claim to the Claims Court under 28 U.S.C. 1631.

REASONS FOR GRANTING THE PETITION

The court of appeals has incorrectly decided a question of great and recurrent practical importance to the federal government and its supervisory employees. Its decision is inconsistent with decisions of several other circuits holding that federal employees with limited remedies under the CSRA may not bring a *Bivens* action seeking money damages. This Court should grant the petition to resolve that inconsistency and to answer the important question of federal jurisdiction raised by this case.[10]

1. The court of appeals' decision that employees with limited remedies under the CSRA may supplement those remedies with a *Bivens* action has major ramifications. We are advised by OPM that the government employs more than 64,000 probationary employees. We are also advised that there are more than 300,000 excepted service employees with limited remedies similar to those of probationary employees (see 5 U.S.C. 4303(e); 5 U.S.C. 7511(a)(1)).[11] The decision below opens the way for a *Bivens* action by all such employees in response to any dismissal, reduction in grade or pay, or suspension,

---

[10] Petitioner does not seek review of the court of appeals' holding that respondent's *Bivens* action was not barred by the exclusivity of his remedy under Title VII of the Civil Rights Act.

[11] The " 'excepted service' consists of those civil service positions which are not in the competitive service or the Senior Executive Service" (5 U.S.C. 2103(a)). Excepted service positions include positions for which it is not practical to hold competitive examinations, such as chaplains and attorneys (5 C.F.R. 213.3102(a) and (d)) and "positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials" (5 C.F.R. 213.3301). Positions may be placed in the excepted service by statute, by the President, or by the Office of Personnel Management. 5 U.S.C. (& Supp. II) 3301, 3302(1); Exec. Order No. 10,577, 3 C.F.R. 218 (1954-1958 Comp.); see 5 C.F.R. 213.101(a).

whenever that action is alleged to violate the Constitution. It also opens the door to *Bivens* actions in response to minor adverse personnel decisions, such as suspensions of less than 15 days, as to which the CSRA denies an MSPB appeal remedy to all employees in most circumstances. 5 U.S.C. 7503. For all three groups—probationary employees, excepted service employees, and employees subjected to minor adverse personnel decisions—the primary remedy for most alleged wrongs is a complaint by the employee to the Office of Special Counsel, the very remedy that the court of appeals here found to be inadequate and, thus, supplemented with a *Bivens* remedy.

This new *Bivens* remedy will foster lengthy and expensive litigation in federal district courts and hinder, through its *in terrorem* effect on supervisors, the efficient management of the civil service (*Bush*, 462 U.S. at 388-389). Congress made a deliberate decision to restrict the remedies of probationary employees, noting that "[t]he probationary or trial period * * * is an extension of the examining process * * * [so that it] is inappropriate to restrict an agency's authority to separate an employee who does not perform acceptably during this [probationary] period." S. Rep. 95-969, 95th Cong., 2d Sess. 45 (1978). Similarly, Congress made deliberate decisions to grant employees in the excepted service lesser procedural rights under the CSRA and to provide limited remedies for minor adverse actions. These congressional determinations have been undermined by the ruling of the court of appeals.

2. The court of appeals' decision is inconsistent with this Court's decision in *Bush* v. *Lucas, supra*. In *Bush*, the plaintiff sought a *Bivens* remedy against his federal employer for alleged First Amendment violations. In its analysis, this Court assumed that the "civil service remedies were not as effective as an individual damages remedy and did not fully compensate [plaintiff] for the harm he suffered" (462 U.S. at 372 (footnote

omitted))—that is, that "a federal right has been violated and Congress has provided a less than complete remedy for the wrong" (*id.* at 373). It concluded, however, that the proper focus for analysis was not on "what remedy the court should provide for a wrong that would otherwise go unredressed," but rather on "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue" (*id.* at 388). The Court held that, in light of the comprehensive procedural and substantive provisions of the civil service laws governing the employment relationship between the government and its employees—provisions which, the Court emphasized, had been carefully constructed by Congress over many years—it would be inappropriate to create a new *Bivens* remedy (*id.* at 388-390; see also *id.* at 390-392 (Marshall, J., concurring)).

The same reasoning applies to the instant case. Although the plaintiff in *Bush* enjoyed the full panoply of procedural protections available under the CSRA, that fact was not crucial to the Court's holding. Rather, the Court deferred to "Congress's ability to make an evenhanded assessment of the desirability of creating a new remedy for federal employees * * *" (462 U.S. at 389). Congress has deliberately and sensibly decided to provide different levels of protection for different groups of employees. Probationary employees, by definition, lack job tenure, and it would be almost a contradiction in terms to erect procedures that make it difficult to dismiss or demote such employees. It would indeed be anomolous therefore, and wreak havoc upon the remedial scheme crafted by Congress, to grant probationary employees a *Bivens* remedy for adverse personnel actions denied to their tenured counterparts. As in *Bush*, "the ultimate question on the merits in this case may appropriately be

characterized as one of 'federal personnel policy' " (*id.* at 380-381). And, again as in *Bush*, the court should "decline to create a new substantive legal liability without legislative aid * * * because * * * Congress is in a better position to decide whether or not the public interest would be served by creating it" (*id.* at 390 (citation and quotation marks omitted)).

The remedies afforded the respondent here were precisely as Congress intended them to be. Respondent, in addition to receiving notice of his demotion and a statement as to why he was being demoted, invoked the jurisdiction of the MSPB's Special Counsel. As Judge Hall explained in her dissent (App., *infra,* 20a-21a), under current law the MSPB's Special Counsel is empowered to investigate and seek correction of prohibited personnel practices (5 U.S.C. 1206(a)(1)), including charges of reprisal for the "disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences a violation of any law, rule or regulation * * *" (5 U.S.C. 2302(b)(9)(A)). Congress specifically designed this remedy to protect employees' constitutional rights (S. Rep. No. 95-969, 95th Cong., 2d Sess. (1978)), and the court of appeals erred in finding it inadequate. The court should instead have deferred to Congress's judgment, schooled in constant oversight of the federal personnel system.

3. There is a sharp split among the circuits on the question whether federal employees with limited remedies under the CSRA should be permitted to supplement those remedies with a *Bivens* action against their supervisors. Three circuits have held that a *Bivens* action is foreclosed by this Court's decision in *Bush*. See *Pinar* v. *Dole*, 747 F.2d 899, 905 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) (probationary employee); *Palermo* v. *Rorex*, 806 F.2d 1266, 1270-1271 (5th Cir. 1987) (excepted service); *Wells* v. *FAA*, 755 F.2d 804, 810 (11th Cir. 1985) (minor

adverse action). See also *Gleason* v. *Malcom*, 718 F.2d 1044, 1047-1048 (11th Cir. 1983); *Braun* v. *United States*, 707 F.2d 922, 926 (6th Cir.), cert. denied, 464 U.S. 991 (1983); *Broadway* v. *Block*, 694 F.2d 979, 985 (5th Cir. 1982); *Harding* v. *USPS*, 618 F. Supp. 1330, 1331 n.2, 1332 (S.D. W.Va. 1985); *Cazalas* v. *Dep't of Justice*, 569 F. Supp. 213, 228-229 (E.D. La. 1983), aff'd, 731 F.2d 870 (5th Cir. 1984), cert. denied, 469 U.S. 1207 (1985); *Francisco* v. *Schmidt*, 575 F. Supp. 1200, 1202 (E.D. Wis. 1983).

Three circuits, including the Ninth Circuit in this case, have concluded that when a federal employee's only remedy under the CSRA is a complaint to the Special Counsel, courts are justified in implying an additional *Bivens* remedy for such employees. *McIntosh* v. *Weinberger*, 810 F.2d 1411 (8th Cir. 1987); *Egger* v. *Phillips*, 710 F.2d 292, 297-299 (7th Cir.), cert. denied, 464 U.S. 918 (1983). See also *Freedman* v. *Turnage*, 646 F. Supp. 1460 (W.D. N.Y. 1986); *Harris* v. *Moyer*, 620 F. Supp. 1262 (N.D. Ill. 1985).

This conflict over the correct interpretation of *Bush* is pointedly illustrated by two irreconcilable decisions handed down by two panels of the District of Columbia Circuit on the same day. *Hubbard* v. *EPA*, No. 85-5145 (Dec. 5, 1986); *Spagnola* v. *Mathis*, No. 84-5530 (Dec. 5, 1986). Both decisions have been ordered reheard *en banc*.

In *Hubbard*, an applicant who was refused a job at EPA petitioned the MSPB's Special Counsel, asserting that he was denied employment because of a prohibited personnel practice. He also brought suit alleging, *inter alia*, a First Amendment *Bivens* claims against an EPA hiring official. A panel of the D.C. Circuit (Judge Silberman, joined by Judge (now Justice) Scalia with Chief Judge Wald concurring in the judgment) held that Hubbard had no *Bivens* remedy under *Bush* v. *Lucas*, *supra*, and was confined to the administrative remedy that Congress regarded as appropriate in light of his status. The panel dismissed the

Ninth Circuit's decision in *Cooper* v. *Kotarski* as "unpersuasive," stating that "we believe that decision misinterprets *Bush* and fails to consider fully the disruptive influence of *Bivens* actions on the civil service."

In *Spagnola*, a second panel (Judges Wright and Wald with Silberman dissenting) held that the very same administrative remedy at issue in *Hubbard*—*i.e.*, a complaint to the MSPB's Office of the Special Counsel—was inadequate to preclude a *Bivens* remedy for Spagnola's claim that he was harrassed and not promoted in violation of his First Amendment rights. The panel, expressly endorsing the Ninth Circuit's analysis in the instant case, read this Court's decision in *Bush* as applying only to situations where a court determines that the remedies available to the employee are adequate and meaningful.

These decisions illustrate how intractably divided judicial authority is over the application of *Bush* to federal employees with limited remedies under the CSRA. This sharp conflict in the circuits has produced a significant disparity in the treatment of federal employees, depending solely upon where they reside. Because the question presented is of great importance to the integrity of the federal civil service, the Court should grant certiorari to resolve the conflict.[12]

---

[12] The instant case raises issues similar to those presented in *United States* v. *Fausto*, cert. granted, No. 86-595 (Jan. 12, 1987). *Fausto* presents the question whether individuals in the excepted service, who also have limited remedies under the CSRA, may sue the United States in the Claims Court under the Tucker Act. We argue in *Fausto*, as we do here, that the CSRA prempts other, more general remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

MICHAEL K. KELLOGG
Assistant To The Solicitor General

BARBARA L. HERWIG
RICHARD A. OLDERMAN
Attorneys

MAY 1987

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-5673
DC No. 82-1636

FRANK K. KOTARSKI,
PLAINTIFF-APPELLANT,

v.

V. L. COOPER, A.E. NAVARRO, W.J. TINSTON,
J.H. KIRKPATRICK, NAVAL AIR REWORK FACILITY,
CAPT. P.A. MONROE, IN HIS OFFICIAL CAPACITY,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the Southern District of California
Honorable William B. Enright, District Judge, Presiding
Argued and Submitted January 11, 1985
Los Angeles, California

[Filed Sep. 16, 1986]

OPINION

Before: NELSON, CANBY and HALL, Circuit Judges

CANBY, Circuit Judge:

Plaintiff, a civilian employee of the Navy, was promoted to a supervisory position subject to a probationary period of one year. He was demoted to his former position during that year, and brought this action in district court

to contest his demotion and seek *Bivens*[1] damages for it. The district court dismissed his complaint with prejudice, and plaintiff appeals. We reverse.

BACKGROUND

In 1981, plaintiff Frank Kotarski was promoted from his position as a GS-12 civilian Navy engineer to the position of GM-13: industrial engineer with supervisory responsibilities. This competitive appointment was subject to a probationary period of one year. 5 U.S.C. § 3321; 5 C.F.R. § 315.802(a) *et seq.* Toward the close of this period, Kotarski's immediate superiors, defendants here, notified him that his performance as a supervisor had been unsatisfactory. Kotarski was accordingly returned to his prior position.

Shortly thereafter, Kotarski filed this action against defendants, seeking reinstatement, back pay, and *Bivens* damages for his demotion. He also sought review of the agency action under the Administrative Procedure Act. The complaint alleged that defendants had violated Kotarski's first, fifth and ninth amendment rights by demoting him from his position as supervisor. Five months later, Kotarski filed a second action alleging that his demotion also violated his rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. That action is still pending in district court. The district court disposed of this first action by dismissing it with prejudice, upon the government's motion. This appeal followed.

---

[1] In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court implied a damage remedy against federal officers for the violation of plaintiff's fourth amendment rights. *Id.* at 390-97. The *Bivens* doctrine has been progressively expanded to embrace other constitutional violations. *See Davis v. Passman*, 442 U.S. 228 (1979) (equal protection); *Carlson v. Green*, 446 U.S. 14 (1980) (eighth amendment); *see generally* K. Davis, *Administrative Law Treatise*, § 27:26 (1984).

DISCUSSION

A. Jurisdiction

In addition to seeking *Bivens* damages against his immediate superiors and review of the agency action under the Administrative Procedure Act, Kotarski seeks reinstatement and back pay from defendant Naval Air Rework Facility, an instrumentality of the United States. Although Kotarski's prayer for relief does not specify the amount of back pay sought, we conclude that it would exceed $10,000. *See Doe v. United States Dept. of Justice,* 753 F.2d 1092, 1101 (D.C. Cir. 1985). As a result, the district court was without jurisdiction over Kotarski's back pay claim. The Tucker Act, 28 U.S.C. § 1346(a)(2), requires that such actions be brought in the United States Claims Court.[2] The claim against the Facility for reinstatement is so integrated with the claim for back pay, that it must likewise be entertained in the Claims Court. *See Schulthess v. United States,* 694 F.2d 175, 178 (9th Cir. 1982); *Giordano v. Roudebush,* 617 F.2d 511, 514-15 (8th Cir. 1980). Accordingly, we remand these claims to the district court for consideration of whether the interests of justice require transfer of Kotarski's back pay and reinstatement claims to the Claims Court. *See* 28 U.S.C. § 1631.[3]

---

[2] For a Tucker Act claim to be brought in the district court, it must (1) seek money (2) not exceeding $10,000 (3) from the United States and (4) be founded either upon a contract or provision of federal law or regulation that can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained. *See Van Drasek v. Lehman,* 762 F.2d 1065, 1068 (D.C. Cir. 1985).

[3] We decline to transfer the claims ourselves, *cf. Van Drasek, supra; Wronke v. Marsh,* 767 F.2d 354 (7th Cir. 1985) (transferring to Federal Circuit under 28 U.S.C. § 1631), because Kotarski may wish to seek the leave of the district court to amend his complaint to waive damages in excess of $10,000 and proceed in district court. *See Hahn v. United States,* 757 F.2d 581, 587-88 (3d Cir. 1985); *Van Drasek,* 762

There is no problem, however, with the district court's jurisdiction over Kotarski's constitutional claims against the individual defendants. *Bivens* actions brought against federal officials in their individual capacities for violations of a plaintiff's constitutional rights are not suits requiring the consent of the United States. The Tucker Act is therefore not implicated. *Van Drasek v. Lehman,* 762 F.2d 1065, 1070 (D.C. Cir. 1985); *Doe,* 753 F.2d at 1101. The district court therefore properly entertained Kotarski's *Bivens* claims.

B. Title VII as Exclusive Remedy

The district court dismissed Kotarski's *Bivens* claims on two alternative grounds. The first was that Kotarski's exclusive remedy lay in Title VII, 42 U.S.C. § 2000e-16. We disagree.

Title VII bars discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C §§ 2000e-2, 2000e-16. As the district court correctly observed, the Supreme Court has held that Title VII is the exclusive remedy for claims of discrimination in federal employment. *Brown v. General Services Administration,* 425 U.S. 820, 835 (1976). That exclusive effect, however, extends only to claims of federal employees that are cognizable under Title VII. *See Davis v. Passman,* 442 U.S. 228, 247 n.26 (1979). As a consequence, "Title VII does not preclude separate remedies for unconstitutional action other than discrimination based on race, sex, religion or national origin." *White v. General Services Administration,* 652 F.2d 913, 917 (9th Cir. 1981).

F.2d at 1069 n.6. If Kotarski reduces his claim to $10,000 or less and pursues it in the district court under the Tucker Act, appellate review of that claim may be had only in the Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295(a)(2).

Kotarski has alleged that he was demoted because his superiors disapproved of his private relationship and living arrangements with his woman friend, in violation of his constitutional right of privacy. He also alleges that he was demoted because of his expression of disagreement with certain policies, practices and expenditures of funds at the Naval Air Rework Facility, in violation of his first amendment rights.[4] Neither of these claims is cognizable under Title VII; accordingly, they are not barred by its preclusive effect.

Defendants contend, however, that Kotarski effectively admitted that his *Bivens* claims were subsumed by his Title VII claim when he filed an affidavit in his Title VII action in which he did "swear and contend" that his involvement in an EEO complaint filed by his woman friend was "the primary reason" for his demotion. We decline to give this affidavit the effect that the defendants urge for it. The affidavit states a contention, and it was sworn on information and belief. It does not state that retaliation for participation in filing an EEO complaint was the *only* reason for Kotarski's demotion. We fail to see how Kotarski's pursuit of a Title VII remedy based on retaliation, *see White v. General Services Administration,* 652 F.2d at 917, can preclude his *Bivens* claims based on alleged constitutional infractions having nothing to do with Title VII. *See Ethnic Employees of Library of Congress v. Boorstin,* 751 F.2d 1405, 1415 & n.14 (D.C. Cir. 1985).

---

[4] The district court did not reach the merits of these constitutional claims, nor do we. *Cf. Doe v. Duling,* 603 F. Supp. 960 (E.D. Va. 1985) (state statutes prohibiting fornication and cohabitation by unmarried adults unconstitutional), *vacated on other grounds,* 782 F.2d 1202 (4th Cir. 1986); *see also Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983), *cert. denied,* 105 S.Ct. 380 (1984); *Wilson v. Taylor,* 733 F.2d 1539 (11th Cir. 1984); *but cf. Andrade v. City of Phoenix,* 692 F.2d 557, 565 (9th Cir. 1982) (Wallace, J., concurring) ("neither the Supreme Court nor this court has held . . . that extramarital sexual relations are constitutionally protected").

C. The Effect of *Bush v. Lucas*

As an alternative ground for dismissing Kotarski's *Bivens* claims, the district court held that they were precluded by the doctrine of *Bush v. Lucas,* 462 U.S. 367 (1983). This ruling presents a much closer question than the Title VII issue, but we conclude that it, too, was erroneous.

In *Bush,* the Supreme Court rejected a *Bivens* claim of a non-probationary federal employee who sought to challenge his demotion on the ground that it was a reprisal for constitutionally protected activity. The Court held that the presence of a congressionally-established, comprehensive regulatory scheme governing federal employer-employee relationships was a "special factor[] counselling hesitation" in implying a *Bivens* remedy. 462 U.S. at 378; *see Bivens,* 403 U.S. at 396. The Court concluded that, in light of the "elaborate remedial system" constructed by Congress, 462 U.S. at 388, it should not add a *Bivens* remedy to those provided by Congress in the exercise of its legislative judgement. *Id.* at 390.

Kotarski contends that *Bush* is inapplicable to his case because the employee in *Bush* was fully tenured and entitled to all of the protections of the civil service system. Kotarski's supervisory appointment was probationary; with regard to that position, he was excluded from the Civil Service Reform Act's definition of "employee" and the remedies that go with it. *See* 5 U.S.C. § 7511(a)(1)(A); *Piskadlo v. Veterans' Administration,* 668 F.2d 82, 83 (1st Cir. 1982).

The defendants counter that the lesson to be derived from *Bush* is that the judiciary should not interfere in the congressionally-ordered scheme of federal employment by fashioning intrusive remedies. If Congress chose to exclude probationary employees from nearly all of the protections of the Act, that decision was a conscious recognition of the fact that probation "is an extension of the ex-

amining process to determine an employee's ability to actually perform the duties of the position. It is inappropriate to restrict an agency's authority to separate an employee who does not perform acceptably during this period." S. Rep. No. 969, 95th Cong., 2d Sess. 45, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2767.

Defendants' reading of *Bush* is not without support. In *Pinar v. Dole,* 747 F.2d 899 (4th Cir. 1984), *cert. denied,* 105 S.Ct. 2019 (1985), the Fourth Circuit held that *Bush* precluded *Bivens* relief for a federal employee who claimed that his temporary promotion had been terminated because of his "whistle-blowing" activities. Because the promotion was temporary, the employee's administrative remedies were no greater than Kotarski's. *See also Carroll v. United States,* 721 F.2d 155 (5th Cir. 1983) (on rehearing) (*Bush* precludes *Bivens* action for former employee seeking reinstatement and back-pay; administrative remedy available for reinstatement but not back-pay), *cert. denied,* 467 U.S. 1241 (1984); *Francisco v. Schmidt,* 575 F. Supp. 1200 (E.D. Wis. 1983) (*Bivens* inappropriate in area of federal employee relations); *Watson v. United States Department of Housing and Urban Development,* 576 F. Sup. 580 (N.D. Ill. 1983) (administrative remedies for probationary employees adequate); *Crumpler v. Etter,* 579 F. Supp. 391 (E.D.N.C. 1983) (congressional provision of some remedy precludes *Bivens* action).

With all respect, we cannot agree with the decision in *Pinar,* or with those in accord with it. First, we resist the tendency unduly to minimize the interests of the employee on the ground that only probationary status is involved. The primary interest asserted by the employee is a first amendment interest in free speech. Second, we regard as essential to the *Bush* holding the availability of a meaningful remedy for the alleged constitutional violation. Third, we do not regard the remedies afforded by the Civil

Service Reform Act to employees in probationary status to be adequate within the meaning of *Bush*. Each of these points requires elaboration.

Probationary status is nothing new; it is agreed that management must retain great flexibility in determining that a probationary employee ought not to be granted permanent status. To grant that proposition, however, is not to deprive probationary employees of all constitutional protection.[5] Accordingly, "[a] probationary employee may be discharged for any reason, or for no reason at all, but not for an unconstitutional reason." *Huffstutler v. Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979). Indeed, the Supreme Court itself made this point quite clear in *Perry v. Sinderman*, 408 U.S. 593 (1972), a case involving a nontenured college professor:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringe his constitutionally protected interests—especially, his interest in freedom of speech.

Id. at 597; *see Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 283-84 (1977). Proba-

---

[5] We do not find *United States v. Connolly*, 716 F.2d 882 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984), relied upon by defendants, to be contrary to our view. In *Connolly*, a probationary employee contested his removal on statutory and regulatory grounds. The court held that he was not entitled to judicial review because Congress intended no such review for probationary employees. The employee also had a first amendment claim, however, and the court did not subject that claim to the same analysis. Instead, the court held that the first amendment claim was not within the Tucker Act jurisdiction of the Claims Court because the first amendment of itself did not create an obligation of the United States to pay money. *Id.* at 886-87.

tionary status, therefore, cannot be the foundation for a total negation of the first amendment rights of the employee.

We therefore are unable to read *Bush* as simply placing probationary employment off limits to the judiciary. It is true that *Bush* emphasized Congress' special interest and authority in dealing with questions of federal employment. *Bush,* 462 U.S. at 398. But *Bush* cannot be read apart from its pervasive emphasis on the remedies provided by Congress for the complaining employee in that case—remedies that the Court noted were unavailable to probationary employees. *Id.* at 385 n.28. The Court stressed that the employee being demoted was entitled to a statement of the charges, an opportunity to offer rebuttal, a decision by a higher official, then an appeal to the Federal Employee Appeals Authority which was required to hold a trial-type hearing. An adverse decision was then subject to judicial review. 462 U.S. at 386-87. If the employee prevailed at any stage, he was entitled to reinstatement with retroactive seniority and full backpay. *Id.* at 388. Thus, as the Court pointed out, "[t]he question [was] not what remedy the court should provide for a wrong that would otherwise go unredressed." *Id.* While the remedies provided by Congress were in some respects not as complete as those that would be available in a *Bivens* action, the congressional scheme nevertheless provided "meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies." *Id.* at 386 (footnote omitted). That conclusion, we suggest, is central to the holding in *Bush.* See *Williams v. IRS,* 745 F.2d 702, 705 (D.C. Cir. 1984) (per curiam).

Guided by *Bush,* then, we view the question before us to be whether the congressional and administrative remedies provided for Kotarski as a probationary employee are sufficient to give meaningful protection to his constitutional

rights. If they are, *Bush* requires us to refrain from implying a *Bivens* remedy. *See Clemente v. United States*, 766 F.2d 1358, 1364 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 881 (1986). If they are not, then it seems appropriate to overcome the hesitation counseled by the fact of federal employment and to imply a *Bivens* remedy, *id.* at 391 (Marshall, J., concurring), at least in the absence of an express congressional negative. *See id.* at 378 n. 14 & 389.

Kotarski argues that he is without remedy for violation of his constitutional rights and that, as in *Bivens*, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). The answer is not quite that simple, however. The remedies provided by the congressional scheme need not provide "complete relief" in order to be adequate to forestall a *Bivens* action, *Bush*, 462 U.S. at 388, and Kotarski was not wholly excluded from the congressionally-designed system.

As a probationary employee, Kotarski was entitled to appeal the agency action to the Merit Systems Protection Board if the action was based upon "partisan political affiliation or marital status." 5 C.F.R. § 315.908(b). Kotarski did attempt such an appeal, apparently on the theory that his privacy claim might be one of "marital status," but the Board held that it was without jurisdiction over his appeal. Accordingly, we may view that remedy as unavailable to Kotarski. Kotarski also submitted his complaint to the Special Counsel of the Board, who is independently authorized to receive complaints of a "prohibited personnel practice." 5 U.S.C. § 1206(a)(1). The definition of "prohibited personnel practice" includes reprisal against a "whistleblower" as well as discrimination against an employee or applicant for employment on the basis of conduct which does not adversely affect performance of the job. 5 C.F.R. § 1250.3(b) (8), (10). The Special Counsel investigated Kotarski's charges both in regard to his relationship with his woman friend and to his whistleblowing activities, and informed him by letter that the

evidence was "insufficient to establish that those matters were significant factors" in his demotion. Kotarski complains that the investigation consisted of interviews that Kotarski was given no access to or record of, and thus had no opportunity to rebut.

If this investigation by the Special Counsel were a part of a system of enforceable relief for constitutional violations, we would be compelled to conclude that no *Bivens* action could be implied. Indeed, the relief could doubtless fall quite short of *Bivens* relief and still be constitutionally adequate, in light of the designed precariousness of the probationary position from which Kotarski was demoted. The role of the Special Counsel in receiving and investigating complaints, however, is not part of a system embodying any remedy enforceable by a complainant who demonstrates a violation of constitutional rights. While the Special Counsel is directed by the statute to receive and investigate any allegation of a prohibited personnel practice, 5 U.S.C. § 1206(a)(1), and to report to the Board and the agency involved if the Special Counsel determines that there are reasonable grounds to believe that a prohibited practice has occurred, § 1206(c)(1)(A), no more need be done. If, after a reasonable time, the agency has not taken corrective action, the Special Counsel "may" request the Board to consider the matter, and the Board "may" order such corrective action as it deems appropriate. § 1206(c)(1)(B). Unlike the complainant in *Bush*, the probationary employee has no enforceable right, and no judicial review, even if he or she demonstrates a constitutional violation. Nor is there any right of participation in the process of investigation and decision whether to take action.

We do not regard this structure as one that provides "meaningful remedies" to one whose constitutional rights have been violated. While the wrong may be righted as a matter of discretion, every constitutional violation by any agency is subject to that kind of correction. The central

features of the congressional remedial system in *Bush* and of the alternative *Bivens* remedy are the right to a forum in which to establish a constitutional violation and the right to enforce significant relief if a violation is shown. Neither feature exists for the probationary employee whose only means of seeking redress is to complain to the Special Counsel.

Our conclusion is supported by *Williams v. IRS*, 745 F.2d 702 (D.C. Cir. 1984) (per curiam), in which the court refused to apply *Bush* to defeat a claim by an Internal Revenue Service attorney who contested his five-day disciplinary suspension. As one ground of its decision, the court stated:

> *Bush* rested in large measure on the meaningful, even if less than optimally effective, statutory remedy Congress made available to the complainant, one that afforded him retroactive reinstatement and back pay. Williams is differently situated; he has no CSRA-conferred guarantee of an administrative adjudication outside the Service or of direct court review.

Id. at 705. *See also Doe v. United States Department of Justice*, 753 F.2d 1092, 1118 n.2 (Wald, J., dissenting); *Harris v. Moyer*, 620 F. Supp. 1262 (N.D. Ill. 1985) (*Bush* not applicable to defeat *Bivens* action by probationary employee, because employee had no statutory right of appeal to Merit System Protection Board). Similarly, *Borrell v. United States International Communications Agency*, 682 F.2d 981, 988-91 (D.C. Cir. 1982), a case decided before the Supreme Court's decision in *Bush*, held that a probationary employee could bring suit in federal court based on her claim that she was discharged for whistleblowing activities. The Civil Service Reform Act was held not to preclude her action because she was excluded from all of its remedies except the right to complain to the Special Counsel. *See also Egger v. Phillips*, 710 F.2d 292, 297-98 (7th Cir.) (en banc) (plurality opinion) (exemption

of FBI agents from civil service regulations permits *Bivens* action), *cert. denied*, 464 U.S. 918 (1983); *but see Broadway v. Block*, 694 F.2d 979, 985-86 (5th Cir. 1982) (*Bivens* action not available to contest reassignment).

The defendants contend that it is anomalous to give probationary employees a greater protection of their constitutional rights, by way of a *Bivens* action, than is available to fully tenured employees, who are confined to their civil service remedies. It may be. *See Francisco v. Schmidt*, 575 F. Supp. at 1203. The alternative, which strikes us at least equally anomalous, is to hold that a *Bivens* action that would otherwise be appropriate for a probationary employee is rendered inappropriate by the enactment of a scheme of enforceable remedies from which probationary employees are excluded by definition. *See Egger v. Phillips*, 710 F.2d at 298 (plurality opinion). To reach such a result, we would have to conclude that Congress had both the intention and the authority to deprive probationary employees of all meaningful protection for their constitutional rights. Like the Supreme Court in *Bush*, 462 U.S. at 378 n.14, we need not decide the question of Congress' authority, for we conclude that it could not have intended such an untoward result.

Moreover, any distortion that occurs as the result of the availability of a *Bivens* action to probationary employees is quite limited. The greater protection for probationary employees extends only to constitutionally based claims; they have no right of appeal or other redress when their probationary status is terminated for normal management reasons. *See, e.g.*, 5 C.F.R. § 315.908(a); *Lehman v. Morrissey*, 779 F.2d 526 (9th Cir. 1985). Nor is it clear that the *Bivens* remedy for probationary employees is invariably preferable to the civil service remedies available to regular employees. Review under the civil service system is almost certainly speedier and less costly than a *Bivens* action. *See Bush*, 462 U.S. at 391 (Marshall, J., concurring). The civil

service complainant enjoys a more favorable burden of proof, and avoids possible immunity defenses that are likely to be asserted in a *Bivens* action. *Id.* We therefore do not regard the availability of a *Bivens* action to probationary employees as a startling development. Of course, Congress can cure any lack of symmetry by bringing *Bivens*-type claims of probationary employees within the regular remedial system.

For the reasons stated above, therefore, we conclude that Kotarski, as a probationary supervisor, is not barred by *Bush v. Lucas* from pursuing his *Bivens* action against those who allegedly violated his constitutional rights.

D. Review Under the Administrative Procedure Act

Kotarski also sought review of his demotion under the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et* seq. This claim is foreclosed by our decision in *Viet v. Heckler*, 746 F.2d 508 (9th Cir. 1984), in which we held that federal courts had no jurisdiction to review federal personnel actions under the Administrative Procedures Act.[6]

E. Due Process

In addition to his claims based on rights of privacy and free expression, Kotarski claimed that his fifth amend-

[6] We do not regard the holding or language of *Veit* to be contrary to our conclusion that Kotarski may seek damages for his demotion in a *Bivens* action. *Veit* dealt with the claim of a regular federal employee that he should have been given a higher job performance rating. We held that, in view of the extensive remedies available to a tenured employee under the Civil Service Reform Act, judicial review was precluded for lack of congressional authorization, even though no administrative remedy was provided for the wrong Veit complained of. *Veit*, 746 F.2d at 511. Our conclusion that no review was available was confined to review of Veit's non-constitutional claim. Veit also had a fifth amendment claim that we dealt with separately on the merits, holding that Veit had failed to show a property interest in a claimed merit increase. *Id.*

ment right to due process was violated.[7] The defendants contend that Kotarski cannot have suffered a deprivation of property without due process, because he had no entitlement or property interest in his probationary supervisor's position. *See Arnett v. Kennedy*, 416 U.S. 134 (1974); *Sampson v. Murray*, 415 U.S. 61 (1974); *Bishop v. Wood*, 426 U.S. 341, 345 n.8 (1976).

Kotarski counters that there was a clear expectancy that he would remain in his supervisor's position so long as he performed satisfactorily, and that this expectancy amounted to an entitlement for fifth amendment purposes. *See Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972). He supports his argument with a reference to a personnel manual. He also contends that sufficient publication of his demotion occurred or will occur that he has been stigmatized in a manner affecting his liberty interest. *See Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *but see Bishop v. Wood*, 426 U.S. 341, 348-49 (1976).

The district court, having disposed of Kotarski's claims against the individual defendants on other grounds, did not address the due process claim. Because the due process issues of entitlement and stigma have subtantial factual components, it would be inappropriate for us to address this claim before the district court has done so. We therefore express no opinions on the merits of the conflicting contentions, and leave the matter for the district court on remand.

F. Immunity

The individual defendants contend that they are entitled to absolute immunity from liability for the commission of

---

[7] To the extent that Kotarski asserts a due process claim against the Naval Air Rework Facility as part of his claim for reinstatement and back pay, the claim is subject to our discussion in part A, *supra*. The district court appeared to treat Kotarski's due process claim as part of his *Bivens* claims against the individual defendants. At least one of Kotarski's due process claims alleged in his complaint seems to be directed at two of the individual defendants.

common law torts when acting within the scope of their employment and authority. *See Barr v. Matteo*, 360 U.S. 564 (1959). With regard to Kotarski's constitutional claims, however, the defendants would be entitled, at most, to qualified immunity. *Butz v. Economou*, 438 U.S. 478 (1978). They would be immune only so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald* , 457 U.S. 800, 818 (1982).

Immunity, too, was not reached by the district court. Whether the actions of defendants violated clearly established statutory or constitutional rights, and whether a reasonable person would have known of them, are matters which it would be premature to determine now. The district court can address those issues, if necessary, upon remand.

G. Conclusion

The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HALL, Circuit Judge, dissenting:

> For what each man wishes, that he also believes to be true.

Demosthenes, Third Olynthiac § 19 (J. Vince trans. 1930).

The majority believes that central to the holding of the Supreme Court's decision in *Bush* v. *Lucas*, 462 U.S. 367 (1983) is the proposition that the remedies provided by Congress for federal employees must give "meaningful protection to . . . constitutional rights." Op at 11. In the majority's opinion, "meaningful remedies" include only remedies where the employee has an "enforceable right," a right to judicial review, or the "right of participation in the process of investigation and decision." Op. at 13. Because the majority believes that the remedies available to Kotarski after losing his temporary promotion are not "meaningful" and because the majority also believes that *Bush* requires such remedies, it concludes that Kotarski is entitled to a full damage remedy in federal court for loss of his temporary promotion if he can prove that his reduced status was effected in violation of constitutional rights. This remedy is available to Kotarski even though employees demoted after receiving permanent promotions in violation of their constitutional rights have no private damage action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and are limited to the administrative avenues of the civil service system. *Bush*, 462 U.S. at 388-90.

The court in *Bush* held that a federal employee who was demoted allegedly in violation of his first amendment rights was not entitled to a private damage remedy under *Bivens*. The majority's belief that the focus of *Bush* is upon the nature of the remedies provided by Congress is not supported by a reading of the case. Time and time

again in *Bush* the Court underscored that the basis of its decision centered on the significant problems of judicial review of federal personnel decisions coupled with the fact that Congress is in a better position to strike a balance between the need for efficient government employees and the need to protect the rights of those employees. These concerns constituted "special factors counselling hesitation [in the creation of a damage remedy] in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396.

The Court punctuated its decision in *Bush* by repeated disclaimers that the nature of the congressionally prescribed remedies did not underlie its rationale. At the outset, the Court explained that the meaning of the phrase "special factors counselling hestitation" first appearing in *Bivens* was illustrated by its prior decisions in *United States v. Standard Oil Co.*, 332 U.S. 301 (1947) and *United States v. Gilman*, 347 U.S. 507 (1954). In *Standard Oil*, the Court refused the government's request for a new damage remedy against a tortfeasor responsible for injuries to a soldier. The Court reasoned that Congress, "the custodian of the national purse," and not the courts should bear the responsibility for fashioning national fiscal policy. *Standard Oil*, 332 U.S. at 314. In *Gilman*, the Court refused to allow the government to seek indemnification from one of its employees responsibile for creating federal liability under the FICA. The Court in *Gilman* noted that the creation of an indemnification remedy would significantly affect the relationship between the government and its employees, impacting employee efficiency and morale as well as federal fiscal policy. *Gilman*, 347 U.S. at 510. *Gilman* held that Congress was in a better position than the courts to fashion such a remedy. *Id.* at 511.

Bush held that the *Standard Oil* and *Gilman* decisions demonstrated that the "special factors" inquiry focuses on which branch of government should decide whether a remedy should be provided.

> The special factors counselling hesitation in the creation of a new remedy in *Standard Oil* and *Gilman* did not concern the merits of the particular remedy that was sought. Rather, they related to the question of who should decide whether such a remedy should be provided. We should therefore begin by considering whether there are reasons for allowing Congress to prescribe the scope of relief that is made available to federal employees whose First Amendment rights have been violated by their supervisors.

Bush, 462 U.S. at 380.

The Supreme Court in *Bush* stated further:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights.
>
> * * *
>
> Thus, we do not decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights. As we did in *Standard Oil*, we decline "to create a new substantive legal liability without legislative aid and as at the common law," 332 U.S., at 302, because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.

Id. at 388-90.[1]

As the majority notes, *Bush* involved a demotion of a non-probationary federal employee. In *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 2019 (1985), the Fourth Circuit held that the Congressional remedial scheme for federal employees losing temporary promotion was constitutionally adequate, and no *Bivens* remedy was required. The majority's position today creates a direct conflict with *Pinar*. I agree with the Fourth Circuit and with the district court in this case that *Bush* precludes a *Bivens* remedy for probationary employees as well.

Under current law, Congress has defined a "prohibited personnel action" as any action that is a reprisal for "a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation . . . " 5 U.S.C. § 2302 (b)(8). Congress enacted provisions like section 2302 so that an action taken by a supervisor "against an employee . . . without having proper regard for the individual's *privacy or constitutional rights* . . . could result in dismissal, fine, reprimand, or other discipline for the supervisor." S. Rep. No. 95-969, 95th Cong., 2d Sess., reprinted in U.S. Code, Cong. & Admin. News at 2745 (emphasis added). Charges of prohibited practices are investigated by the Office of the Special Counsel which may recommend corrective action to the agency. 5 U.S.C. § 1206(a)-(c). If the agency fails to implement the recommended corrective action, the Special Counsel may request the Merit Systems Protections Board to consider the matter, and the Board may in turn order corrective action. 5 U.S.C. § 1206(c)(1)(B). Further, the Congressional scheme allows the Special Counsel to re-

[1] Only two justices took the position that the congressionally-adopted remedy should approximate *Bivens* relief. *See Bush*, 462 U.S. at 390-92 (Marshall, J., concurring).

quest, and the Board to grant, stays of personnel actions the Special Counsel reasonably believes were taken as the result of prohibited practices.

With this remedial system in place, Kotarski cannot claim that "it is damages or nothing." *Bivens* 403 U.S. at 410 (Harlan, J., concurring). Congress has enacted a scheme carefully tailored to balance the many competing concerns implicated in regulating federal employment and has chosen this remedial mechanism over a system allowing litigation between federal employees over employment-related discipline. In crafting the system, Congress has decided that different levels of protection are required for rights of differing magnitude. For demotion or termination of non-probationary employees, the full complement of administrative remedies discussed in *Bush* is available. For less severe personnel actions such as a termination of a probationary promotion, Congress has determined that review by the Special Counsel and in certain cases by the Board sufficiently deters constitutionally impermissible personnel decisions while maintaining morale and efficiency. *Bush* has stated that Congress is in the better position to decide whether a damage remedy is appropriate. Congress has decided that it is not, and I agree with the Fourth Circuit that Congress' decision precludes a *Bivens* remedy here. *See Pinar*, 747 F.2d at 911 and n.9. *See also Crumpler v. Etter*, 579 F. Supp. 391, 392 (E.D.N.C. 1983); *Watson v. United States*, 576 F. Supp. 580, 585-86 (N.D. Ill. 1983); *Francisco v. Schmidt*, 575 F. Supp. 1200, 1202-03 (E.D. Wis. 1983).

This is not a case in which Congress has expressly decided to provide no remedy at all or where Congress has failed to consider the need to remedy constitutionally proscribed conflict in the context of federal employment. The majority seems to view this case as a "no remedy" case or at least a "meaningless remedy" case, basing its conclusion on the fact that Kotarski cannot force the Special Counsel to take action or to bring the matter to the attention of the

Board, that he cannot seek judicial review or that he cannot participate directly in the investigation.[2] I find no support in *Bush* or *Bivens* for any of these requirements. The majority concedes that the Congressionally-supplied remedy need not be coterminous with a *Bivens* remedy, and with that much I agree. I agree with *Pinar*, however, that the procedures provided for the loss of a temporary promotion are constitutionally adequate.

Congress has made a considered judgment that the remedies provided for the loss of a temporary promotion are sufficient to protect the rights of federal employees while maintaining the appropriate levels of efficiency and morale in both the supervisors and the supervised. The Supreme Court has decided that Congress is in the best position to make this decision and that, when it has done so, the courts should not interfere with the balance Congress has struck. The majority may wish that Congress had done so, the courts should not interefere with the balance Congress has struck. The majority may wish that Congress had done more – but that is not enough.

I dissent.

---

[2] Of course, the employee does participate to the extent that he provides the Special Counsel with the facts underlying his claim and to the extent he is required to respond to the Special Counsel's inquiries.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 82-1636-E(M)

FRANK K. KOTARSKI, PLAINTIFF,

v.

V. L. COOPER, ET AL., DEFENDANTS.

[FILED FEB. 8, 1984]
[ENTERED FEB. 9, 1984]

MEMORANDUM DECISION

BACKGROUND

Plaintiff brings this lawsuit to challenge his demotion from a probationary position as a supervisory employee for the United States Civil Service to his original civil service position as a civilian engineer. Plaintiff was a GS-12 civilian engineer at the Naval Air Rework Facility on North Island, located off the coast of San Diego, California. He was subsequently promoted to a GM-13 position as a supervisory employee. This appointment was clearly probationary and contingent upon the successful conduct of plaintiff in that position. During his probationary period, plaintiff's supervisors, defendants in the present case, made a determination that his performance as a supervisor had been unsatisfactory. Plaintiff was accordingly returned to his original engineering position.

Plaintiff alleges that this demotion violates his constitutional rights as guaranteed by the first, fifth and

ninth amendments of the United States Constitution. Jurisdiction of the court is predicated upon the court's general federal question jurisdiction under 28 U.S.C. § 1331 (Supp. V 1981). Specifically, plaintiff is alleging a *Bivens*-type cause of action arising directly under the Constitution. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

Plaintiff contends that he was demoted from the supervisory position as a result of his involvement in a fellow employee's complaint to the Equal Employment Opportunity Commission alleging racial discrimination. Plaintiff also theorizes that he may have been demoted because he and his girlfriend shared living accommodations but were unmarried.

On April 19, 1983, plaintiff filed another complaint which was also assigned to this court. *Kotarski v. Lehman,* Civil No. 83-0187-E. In that complaint, plaintiff alleges that the above-described demotion was in violation of his civil rights as protected by 42 U.S.C. § 2000e-16. Only the earlier *Bivens* case is presently before this court on motions. In that *Bivens* case, defendants move the court to dismiss the complaint with prejudice or, in the alternative, for summary judgment.

HOLDING

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at the hearing, and for the reasons set forth herein, the court grants defendants' motion to dismiss with prejudice.

DISCUSSION

Plaintiff's *Bivens* claim fails on two counts. First, plaintiff has filed suit and may have a remedy under Title VII of the Civil Rights Act; the availability of this alternative remedy precludes plaintiff's *Bivens* claim directly under the Constitution.

Section 2000e-16, 42 U.S.C. § 2000e-16 (Supp. V 1981), was added to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (Supp. V 1981), by the Equal Opportunity Act of 1972, which made available to federal employees remedies for employment discrimination that were previously limited to employees of private employers. Section 2000e-16 prohibits the federal government from discriminating against its employees on the basis of race, color, religion, sex or national origin.

In *Brown v. General Services Administration,* 425 U.S. 820 (1976), the Supreme Court determined that Title VII provides the exclusive avenue of relief for federal employees to obtain redress for employment discrimination. *See also White v. General Services Administration,* 652 F.2d 913 (9th Cir. 1981); *Scott v. Perry,* 569 F.2d 1064 (9th Cir. 1978). The Supreme Court in *Brown,* however, did not precisely delineate the scope of its exclusivity holding and the circuits have differed in their analysis of the continued availability to federal employees of causes of action under Sections 1981, 1983 and 1985 of the Civil Rights Acts, 42 U.S.C. §§ 1981, 1983, 1985 (1976, Supp. IV 1980 & Supp. V 1981), and under a *Bivens* theory. *Compare Newbold v. United States Postal Service,* 614 F.2d 46, 74 (5th Cir. 1979), *cert. denied,* 449 U.S. 878 (1980) *and Scott v. Perry, supra, and Gissen v. Tackman,* 537 F.2d 784, 786-87 (3d Cir. 1976) (en banc), *with Penn v. Schlesinger,* 490 F.2d 700 (5th Cir. 1973), *rev'd on other grounds,* 497 F.2d 970 (5th Cir. 1974) (en banc), *cert. denied,* 426 U.S. 934 (1976), *and Brosnahan v. Eckerd,* 435 F. Supp. 26, 28 (D.D.C. 1977), *and Neely v. Blumenthal,* 458 F. Supp. 945, 955 (D.D.C. 1978). The Ninth Circuit has joined the circuits which hold that Section 2000e-16, as interpreted by the Supreme Court in *Brown,* is the *exclusive* federal employment discrimination remedy. *White v. General Services Administration,* 652 F.2d 913 at 916; *Scott v. Perry, supra,* 569 F.2d at 1065.

And, while the Ninth Circuit has not specifically addressed the effect of the exclusivity holding on the availability of a *Bivens* remedy, it has implied that the *Bivens* remedy is not available to federal employees by rejecting the rationale underlying the decisions which support the continued availability of *Bivens*.

In *Neely v. Blumenthal, supra,* 458 F. Supp. at 955, the district court held that, despite *Brown,* a cause of action could still be stated for employment discrimination against a federal employee by a government official acting in his individual capacity under the *Bivens* rationale. The court relied on the fact that in *Brown* the Supreme Court did not address the liability of government officials acting as individuals, but instead dealt with the liability of the federal government as an entity. Thus, the court held that an action could be brought for an alleged first amendment violation against federal officials as individuals based on *Bivens*.

The Ninth Circuit, in *White v. General Services Administration, supra,* 652 F.2d at 916, rejects the rationale of *Neely*. In its opinion, the court states: "White asserts, however, that the holding in *Brown* is limited to actions against the United States and does not extend to actions against federal officials acting in their individual capacities. We disagree." *Id.* Further, and more importantly, the court went on to hold that a *Bivens* remedy would not be implied where relief under Title VII was available. *Id.* at 917.

In sum, in the Ninth Circuit, a federal employee cannot state a claim based on *Bivens* where relief under Title VII by way of Section 2000e-16 is available. Plaintiff in the instant case has filed a suit based on Section 2000e-16; hence, he must succeed or fail based on that cause of action.

In addition, plaintiff's *Bivens* remedy fails under the rationale of *Bush v. Lucas,* __ U.S. __, 103 S. Ct. 2404

(1983). In that case the Supreme Court addressed the availability of a *Bivens* remedy in light of the federal employee's administrative remedies within the civil service system. The Court noted that there are two situations in which the implication of a *Bivens* remedy is inappropriate. The first is when Congress has, expressly or impliedly, indicated that the Court's power should not be exercised in favor of creating a new remedy. The second is when there are present "special factors counselling hesitation" against implying the new remedy. One such "special factor," the *Bush* Court concluded, is the presence of a comprehensive federal regulatory scheme set forth by Congress. The Court concluded that the civil service administrative appeals process, which allowed an employee to obtain review for an alleged retaliatory demotion, was such a scheme; hence, the Court declined to imply a *Bivens* remedy allowing the aggrieved employee to sue directly under the Constitution.

The ruling in *Bush* precludes the implication of a *Bivens* remedy in the present case. In *Bush,* the Court indicated that where a federal personnel decision is at issue, the presence of the comprehensive civil service scheme precludes the grant of *Bivens* relief. The Court emphasized that the important interest it was protecting in the *Bush* decision was "federal personnel policy." 103 S. Ct. at 2412.

Plaintiff contends that because he was a probationary employee and thus lacked the full panoply of administrative remedies available to an ordinary civil service employee, the *Bush* case does not control. This is not persuasive. The *Bush* Court made clear that the administrative remedy need not provide complete relief:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step with careful

> attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights.
>
> The costs associated with the review of disciplinary decisions are already significant—not only in monetary terms, but also in the time and energy of managerial personnel who must defend their decisions.

Id. at 2416-17. Plaintiff has obtained the administrative review provided to probationary employees with grievances of the type plaintiff raises. The report of the Merit Systems Protection Board issued after review of plaintiff's case concluded that there was no wrongdoing by defendants. In providing probationary employees with fewer avenues of review for challenging federal personnel decisions, Congress made a reasoned choice that personnel decisions as to probationary employees should be governed by fewer impediments to managerial discretion. This court declines to interfere with that determination.

In sum, given the availability of alternative relief for plaintiff by way of his suit under Title VII and the potential for interference with federal personnel policy, defendants' motion to dismiss plaintiff's *Bivens* claim is granted.

DATED: February 7, 1984.

/s/ WILLIAM B. ENRIGHT

William B. Enright, *Judge*
United States District Court

Copies to:
Plaintiff
Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 82-1636-E(M)

FRANK K. KOTARSKI, PLAINTIFF,

v.

V. L. COOPER, ET AL., DEFENDANTS.

[FILED FEB. 8, 1984]
[ENTERED FEB. 9, 1984]

ORDER

Pursuant to this court's Memorandum Decision dated February 7, 1984, the court hereby grants defendants' motion to dismiss with prejudice.

IT IS SO ORDERED.

DATED: February 7, 1984.

/s/ WILLIAM B. ENRIGHT
William B. Enright, *Judge*
United States District Court

Copies to:
Plaintiff
Defendants

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5673
DC No. 82-1636

FRANK K. KOTARSKI, PLAINTIFF-APPELLANT,

v.

V. L. COOPER, A.E. NAVARRO, W.J. TINSTON,
J.H. KIRKPATRICK, NAVAL AIR REWORK FACILITY,
CAPT. P.A. MONROE, IN HIS OFFICIAL CAPACITY,
DEFENDANTS-APPELLEES.

[Filed and Entered September 16, 1986]

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed & remanded.

A TRUE COPY
ATTEST 27, Jan 1987
Cathy A Catterson
by:/s/ ERNESTO M. CRUZ
Ernesto M. Cruz
Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-5673

FRANK K. KOTARSKI, PLAINTIFF-APPELLANT,

v.

V. L. COOPER, ET AL., DEFENDANTS-APPELLEES.

[FILED JAN 13, 1987]

ORDER

BEFORE: NELSON, CANBY AND HALL, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggested for rehearing en banc is rejected.

APPENDIX E

STATUTES INVOLVED

CHAPTER 23 – MERIT SYSTEM PRINCIPLES

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section –

(A) "personnel action" means –

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evalution under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include –

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

* * * * *

CHAPTER 43 – PERFORMANCE APPRAISAL

SUBCHAPTER I – GENERAL PROVISIONS

§ 4301. Definitions

For the purpose of this subchapter –

* * * * *

(2) "employee" means an individual employed in or under an agency, but does not include –

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service;

(F) an individual appointed by the President; or

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instance of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30

days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

* * * * *

CHAPTER 75—ADVERSE ACTIONS

SUBCHAPTER I—SUSPENSION FOR 14 DAYS OR LESS

§ 7501. Definitions

For the purpose of this subchapter—

(1) "employee" means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less[.]

§ 7502. Actions covered

This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title or any action initiated under section 1206 of this title.

§ 7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for

14 days or less for such cause as will promote
cy of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to—

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting [*sic*] the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

§ 7511. Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has com-

BEST AVAILABLE COPY

pleted 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

* * *

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

§ 7512 Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter,

* * * * *

CHAPTER 77—APPEALS

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. * * *

* * * * *

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. * * *

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40333

No. 86-1813

Supreme Court, U.S.
FILED
JUL 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

V.L. COOPER, ET AL., PETITIONERS

V.

FRANK K. KOTARSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

FRANK K. KOTARSKI
7714 Nightingale Way
San Diego, CA 92123
(619) 279-7076

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
REASONS FOR DENYING THE PETITION	3
CONCLUSION	13

TABLE OF AUTHORITIES

CASES CITED

Bush v. Lucas, 103 S. CT. 2404 (1983)	5,6
Davis v. Passman, 442 U.S. 228 (1979)	12

CONSTITUTION

Fifth Amendment	10

STATUTES

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ...	8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. 86-1813

V.L. COOPER, ET AL., PETITIONERS

v.

FRANK K. KOTARSKI

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether a probationary federal employee, for whom the civil service system offers no meaningful remedies for redress of alleged constitutional injury, may bring a Bivens action against his superiors seeking money damages. Whether a probationary employee may challenge the constitutionality of the statutes and regulations dealing with his probationary status.

STATEMENT

The facts of the case are adequately stated in the decision by the Ninth Circuit Court of Appeals (Petitioners Appendix A, at 1A - 16A).

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied as the Court of Appeals correctly decided the issues in the case and the result of that decision was fair and just. The decision reached was also consistent with the Constitution and Supreme Court precedent.

The matter before the Court does not address the factual issues of respondent's case. It deals with the issue of whether or not respondent will ever be able to present his case. Respondent has alleged violations of his constitutional rights and seeks to enforce those rights in a court of law. Petitioners are arguing that respondent can pursue only the remedies provided by Congress and that the courts should defer to Congress on matters affecting the federal employer-employee relationship.

The constitutional implications of adopting the petitioners position are enormous. The rights guaranteed to the citizens of this country by the Constitution imply a means to enforce those rights. A right that provides no enforcement mechanism becomes a mere expectation. Its viability is dependent on the disposition of individuals rather than the demands of law.

If respondent, as a probationary employee, has no meaningful remedies to pursue for constitutional injury, then he has no constitutional rights during that status. If Congress can except probationary employees from the guarantees of the Constitution, as petitioners claim, it then has the authority to exclude all federal employees. Constitutional rights should not attach in varying degrees dependent on one's job status. They apply uniformly to the citizens of this country.

Congress either has the authority to alter those rights or it does not. If Congress does, then it can merely redefine the status of any federal employee or limit the remedies available based on its perception of governmental need.

Petitioners reliance on the Bush v. Lucas decision to support its position neglects to examine the context surrounding that decision. Respondent's review of that case yields a much different finding than petitioner's. The Court in Bush, while denying a Bivens remedy to the federal employee seeking it, recognized the requirement for a meaningful, constitutionally adequate remedial system for redress of constitutional injury. When that standard is met by Congress, in a comprehensive remedial scheme, the Court will not fashion a new judicial remedy. But the real test is whether the system established meets the threshold requirements of the

Constitution not the fact that Congress created it. The courts should not defer to Congress as proposed by petitioners but must examine if the remedies provided allow meaningful protection of constitutional rights. Congress can provide alternative remedies. It, however, is bound by the Constitution and cannot create a system that effectively eliminates any meaningful remedy.

The Court recognized the issue in Bush v. Lucas, 103 S.CT. 2404 (1983) by stating:

> We need not reach the question whether the Constitution itself requires a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. ..... The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate. Id., at 2411, (footnote 14)

Petitioners claim that Congress established the Office of Special Counsel to protect employees' constitutional rights but that is again not the test proclaimed in Bush v. Lucas. The remedy provided must

be constitutionally adequate. Petitioners own description of the Special Counsel's activities uses terms such as "may recommend corrective action" or "may initiate a proceeding". Their functions are entirely discretionary.

The Office of Special Counsel also conducts its business in a manner that excludes the complaining party from participating in the process at all. Throughout the Special Counsel's investigation, respondent was offered no opportunity to question witnesses, review testimony or rebut evidence. He was not even made aware of the material that was being offered. Respondent was given a bare finding by the Office of Special Counsel with no supporting documentation. It would greatly stretch the boundaries of legal rationalization to hold such a system is meaningful and constitutionally adequate.

Petitioners argue that allowing a Bivens action in this case will have major ramifications for the federal government. They claim that it will open the door to costly and expensive litigation by more than 364,000 federal employees with limited remedies under the Civil Service Reform Act. They point out that minor personnel actions, such as 15 day suspensions, may be challenged by allegations of unconstitutional actions.

What petitioners do not present is the fact that respondent is the only probationary employee ever removed from his position at the Naval Air Rework Facility. This Naval Command had a workforce of over 5000 civilian employees. They fail to mention that, for the overwhelming majority of people, litigating any dispute is highly stressful, extremely expensive, time consuming and to be avoided if at all possible. The flood of nuisance lawsuits,

envisioned by petitioners, is more likely to be limited, responsible attempts to redress perceived constitutional injury.

Petitioners argue further about the in terrorem effect on supervisors and how it will hinder the efficient management of the Civil Service. Petitioners are mistaken when they propose that the best interests of the supervisors or management are synonymous with the best interests of government. A government that must function by infringing on the most basic rights of its employees is wrongly defining its interests with the self-interests of those in positions of authority. There is no serious rationale that can be advanced to support the proposition that supervisors must be free, at times, to violate the constitutional rights of probationary employees if the government is to operate properly. The ability to perform the most serious constitutional misdeeds without

fear of any consequence will have a more serious in terrorem effect on all federal employees.

The Court of Appeals decision allows the constitutional issues raised by respondent to be contested in a trial, nothing more. Respondent still has a heavy burden to prove his case. If petitioners demonstrate that the motives for their actions are as claimed, respondent cannot win. If petitioners can show their ample documentation is a true recounting of the events, respondent cannot win. If, however, constitutional rights were violated and materials fabricated to obscure that fact, then respondent must have the opportunity to present those issues in a court of law.

Respondent has also challenged the constitutionality of the laws and regulations applicable to probationary employees as violative of 5th Amendment due

process of law guarantees. The current regulations require sufficient cause to justify removing a probationary employee from his position but allow no challenge to the legitimacy of the reasons that are offered for the removal. The removal and the reasons advanced as justification must be shown on each subsequent job application that is submitted within the federal government. The severity of the justification and the rarity of the event effectively precludes a removed probationary employee from career advancement or mobility within the federal government. The violation of property and liberty interests is a valid constitutional issue that should not be summarily dismissed. Presentation of these issues with a full exploration of the facts, at trial, must be allowed.

The Supreme Court has consistently supported the enforcement of constitutional rights by individuals in a court of law

where that is the only available means to preserve those rights. The Court in Davis v. Passman, 442 U.S. 228, at 242 (1979) stated:

> And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights

If there is a permanent solution to the issues presented by this case it is the responsibility of Congress to provide it. Congress can include probationary employees within the present remedial system for allegations of constitutional injury. This would effectively preclude a Bivens action, in the circumstances of this case, by providing a constitutionally adequate, alternative remedy.

Respondent recognizes the division in the circuits regarding this subject matter but believes the decision rendered by the Ninth Circuit Court of Appeals to be just, fair and correctly comports with applicable law and precedent. He respectfully requests the Court to deny certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

Frank K. Kotarski
Respondent